No. 2681.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FREDERICK EGGERS, as Sheriff of the City and County of San Francisco, California, SOPHIE SUTER, SOPHIE SUTER, as Executrix of the Will of Daniel Suter, Deceased, and OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (otherwise Kruger), Administrator of the Estate of Anna Maria Krueger (otherwise Kruger), Deceased,

Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Reply Brief for Appellee.

WARNER TEMPLE,
Solicitor for Appellee.

M. H. FARRAR,
Of Counsel.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

THE JAMES H. BARRY CO

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Appellee.

REPLY BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is a suit in Equity to enjoin the enforcement of a Writ of Possession, by appellants, issued out of a State court, in a judgment obtained therein, in a

suit in ejectment, between appellant Sophie Suter, as Executrix of the Will of Daniel Suter, deceased, against August Ferdinand Krueger (otherwise Kruger), as an individual, and, further, to enjoin each of the appellants from asserting claim or right of possession, under said judgment to or in the real property described in appellee's bill.

Anna Maria Krueger (otherwise Kruger), the mother of appellee, died, intestate, in May, 1902, in the City and County of San Francisco, State of California, leaving certain real property, in said city and county, upon which there were two mortgages, one, to the Hibernia Savings and Loan Society of San Francisco, and the other to Daniel Suter, a lawyer. The bank's mortgage was a first mortgage. After her death, John Farnham, the public administrator of the City and County of San Francisco, was appointed administrator of her estate, though appellee was living with said deceased, at the time of her death, in their home upon said real property, and he was not informed of such proceedings.

In November, 1902, said bank brought an action to foreclose its mortgage, joining Farnham, as administrator of the Estate of Anna Maria Krueger (otherwise Kruger), deceased, and, said Daniel Suter. Said Farnham did not appear, by answer or otherwise, in said action, and judgment, sort of "pro forma by default" (Record, p. 87) was given the bank. The decree of foreclosure recited that said Farnham had

appeared, and, that summons had been served upon him, and, that he had filed in the court his answer. Thereafter, at the Commissioner's sale under foreclosure, on July 8, 1903, said Daniel Suter bought in said real property, paying the bank's claim, and receiving a Commissioner's Certificate of Sale.

Appellee, for said estate and, for himself, as heir of his mother, during all this time, was in possession of the real property, and continues in the possession thereof.

About two months before the time to *redeem* (not appeal,—the time to appeal having long elapsed) under the sale at foreclosure, appellee discovered that Farnham was administrator of his mother's estate, and, that the bank had foreclosed its mortgage and the property bought in by said Suter. Appellee then called upon Warner Temple, Esq., explained to him the case, and asked said Temple to assist and make arrangements to *redeem* said property. As Krueger (otherwise Kruger) was without money, it was necessary to investigate the foreclosure record to ascertain the condition of the action, and the title to the property. Said Temple immediately looked over the records in said foreclosure action, and found that no summons had been returned to the Court, nor, was there any affidavit of service of summons being served on said Farnham, nor, was there any answer of said Farnham, on file, in said foreclosure action, in the papers in said case, in the office of the County Clerk,

though the decree recited that summons had been served on Farnham, and return of service filed in the clerk's office, and, that said Farnham had filed his answer to said action to foreclose, for said Anna Maria Krueger (otherwise Kruger), deceased.

Appellee, August Ferdinand Krueger (otherwise Kruger) was substituted as administrator of the estate of said Anna Maria Krueger (otherwise Kruger), in the place of said Farnham, and, immediately thereafter, through his attorney, said Warner Temple, made a motion in the foreclosure proceedings to set aside the decree of foreclosure on the grounds of defects apparent on the face of it, and, for want of jurisdiction in the Court to make the decree (Record, p. 81). Daniel Suter asked leave, in resisting the motion, to file for said Farnham, an unverified general denial answer, *nunc pro tunc,* said answer to be read as a pleading to the bank's complaint for foreclosure, in the decree rendered. This was objected to by Mr. Temple, but, over such objection, Judge Hebbard made the order permitting the said answer, proposed by said Suter, to be filed *nunc pro tunc,* and, further, denied said Krueger's (as administrator) motion to vacate the said decree. This, being an order made after judgment, and, an appealable order, Temple, for Krueger, as administrator, gave notice of appeal, and filed bond on appeal, in the sum of $300.00, from the said order of Judge Hebbard refusing to vacate the said faulty and void decree of foreclosure, and,

the order permitting the said answer to be filed *nunc pro tunc.* When Temple presented his *Bill of Exceptions,* to support Krueger's appeal from said order, for settlement, said Suter being present (Record, pp. 81, 82, 83 and 85), Judge Hebbard remarked that he evidently had no jurisdiction to make the decree of foreclosure (Record, pp. 60 and 83), and refused to settle the Bill of Exceptions and then directed Mr. Temple to renew Krueger's motion to vacate the said faulty and void decree. The motion was again made and granted, in Suter's presence. From the order setting aside said decree of foreclosure, Suter did not appeal, and during his lifetime thereafter (a period of some seven and one-half years), took no steps regarding the same. In January, 1910, said Daniel Suter wrote offering $1750 to buy Krueger's interest in the property (Tr., p. 64).

Before the decree of foreclosure was set aside, Suter had obtained a deed to said real property from the Commissioner. But, the motion to set aside said decree had been made before said deed was given Suter, and, also, before the *time to redeem* had passed.

As the law requires the performance of no useless act, said appeal of Krueger was abandoned by mutual consent between said Krueger and Suter.

There was never an appeal from the *judgment* of foreclosure in the bank's action, (as set out at page 10 of appellants' brief, and, as is incorrectly stated on page 99, Record).

Daniel Suter died in San Francisco, in 1913. His widow, Sophie Suter, was appointed executrix of his Will. Thereafter (August 5, 1913) she brought an action *in ejectment* against August Krueger (otherwise Kruger) *as an individual.* Krueger, being without means, and, after receiving from the Court additional time to plead, filed an answer, drawn by himself, to said ejectment suit, claiming possession and asserting a title adverse to Daniel Suter, in his mother, said Anna Maria Krueger, deceased (Record, p. 52). Thereafter, Mrs. Suter's attorney asked that a guardian *ad litem* be appointed for Krueger, asserting *his* belief that said Krueger was incompetent to handle his own affairs, or to defend himself, and suggested that said Otto Tum Suden, a lawyer in San Francisco, be appointed as such guardian (Record, pp. 29, 95). Otto Tum Suden was appointed guardian, giving *no bond* or *security,* and filed two answers in said ejectment suit, one answer setting up general denials only, and then an amended answer, setting up as a defense the Statute of Limitations. The action (ejectment) was tried December 13, 1913. All the facts of the said foreclosure judgment were given to said Otto Tum Suden by said Krueger and said Temple. Said Temple appeared at the trial of the ejectment suit and testified. After trial, the case was submitted, and in March, 1914, *judgment was rendered in favor of said Krueger, denying that said Estate of Daniel Suter had any interest in the said real property of*

said Anna Maria Krueger, deceased. All the parties to the action, as well as the evidence and testimony given at the trial, were before the trial judge. Thereafter, without consulting with Krueger, or with Temple, Otto Tum Suden consented to a new trial of the action, unknown to, and, without either Krueger or Temple being in court, or called for additional testimony, or to explain any testimony given at the December trial, and, no further testimony given, and, upon the approval solely of said guardian *ad litem,*—he concurring with and aiding, *against his ward,* the said attorney for Mrs. Suter, and Mrs. Suter,—and by deception on the Court, as to the truth of the situation, and, without fully and completely informing or advising the Court, the Court set aside the said judgment in favor of Krueger, and caused to be entered a second judgment in favor of Mrs. Suter (July 11, 1914), notwithstanding that Mrs. Suter had appealed from the judgment of March, 1914, and that appeal was pending and not disposed of.

Between March, 1914,—when the State Court gave judgment, in the ejectment suit, in favor of Krueger, and July 11, 1914, when said Court, on the statements made to it by Otto Tum Suden and Mrs. Suter's attorney, both acting for one purpose, entered judgment against Krueger and for Mrs. Suter,—the attorney for Mrs. Suter had filed a motion for a new trial (Record, p. 34) and gave notice of appeal, and settled a bill of exceptions on this appeal. There

has never been a dismissal of this appeal. No argument was had on the motion for a new trial. Also, during this time, negotiations were had between Tum Suden, Mrs. Suter and her attorney, whereby it was agreed that Mrs. Suter should pay $1500.00, *as a compromise of Krueger's claims,* (Mrs. Suter's husband, before his death, had offered $1750.00 for the same claims, Tr., p. 64), also that the said Tum Suden, by virtue of his supposed authority as said guardian *ad litem,* would consent to the granting of the motion for a new trial, and, of judgment being entered in favor of Mrs. Suter, and waive all errors and right of appeal from such judgment. Pursuant to such agreement, Mrs. Suter's attorney and said Tum Suden appeared before the Court and said Tum Suden, aiding and abetting the said Suter attorney, consented to the granting of the motion for a new trial, and prevailed upon the Court to enter said judgment of July 11, 1914, against said Krueger. And, to bind this act, and, to as effectually as possible oust Krueger, under a legal cloak, Tum Suden, as said guardian *ad litem,* presented to the Court a petition praying for leave to compromise said litigation for said sum of $1500.00 on the ground that Krueger was poor, without money, and unable to bear further litigation, and that he had no rights in said property anyway, and thereont Tum Suden asked for compensation in the sum of $250.00 for his services as guardian *ad litem;* and, on the same day as said petition was presented for compromise (Record, pp. 90, 91.

92), and, without said Krueger being in Court, or in anyway advised of the proceedings, the Court heard the petition and gave its order of compromise and allowance of attorney's fees as prayed. By this compromise, said Tum Suden, as guardian *ad litem* of Krueger, an individual, disposed of the rights of Krueger, as administrator of the estate of Anna Maria Krueger, deceased. Krueger is still the administrator of the estate of his mother, no order revoking his letters of administration having been made, and, the estate being still in course of administration, unsettled, and not distributed, and no provision or order made for the payment of the charges and fees of administration, the same being still unpaid.

Tum Suden, as guardian *ad litem,* was an officer of the Court, in whom the Court reposed confidence, and, it is this confidence of the Court in its officers, abused by Tum Suden, that caused the Court to believe the statements made to it, and to give the order granting a new trial, and, to enter judgment for Mrs. Suter, and to grant the order of compromise, on the theory that it was for the best interests of Krueger, and, that it was sufficient payment to him, *for his equity in said property,* if the amount claimed as due by Mrs. Suter (Record, pp. 35 and 36) is true, and, to prevent further litigation. This statement of the amount due from the Krueger Estate to the Estate of Suter is denied by Krueger; also, the value of $15,000.00, placed upon said property by Mrs. Suter

is denied, the value claimed being at least $18,000.00. Under the mortgages foreclosed by the bank, and the Suter mortgage, *the mortgagee had to pay all taxes,* and these were not chargeable to Krueger, nor could they become a lien upon the property. Under these same mortgages, it was provided that any assessments paid by the mortgagees, was but an extra charge, drawing interest in the same manner as the principal of the mortgage. Then, too, Suter never having asserted claim to said property for more than five years, said Krueger being in possession thereof, and living thereon continuously, any claims, otherwise than his mortgage debt, are barred by the Statute of Limitations, though Krueger has always wished to pay his just debt to Suter, without resort to the statute of limitations, and is still willing to do so.

In August, 1914, immediately after said judgment of July 11, 1914, was entered in said ejectment suit, Krueger, through another attorney (Record, pp. 39, 40) filed his motion to have said judgment, and all other papers filed and signed by said guardian *ad litem,* set aside. This motion was denied, August 17, 1914. Thereafter, appellants caused to be issued a Writ of Possession of said property, and placed the same in the hands of said defendant Eggers, and he, as sheriff of the City and County of San Francisco, forthwith proceeded to execute the same, and oust said Krueger from said property.

Thereafter, said Krueger filed in the District Court

of the United States, Northern District of California, a Bill in Equity, No. 131. On the hearing of the Order to Show Cause therein, and, the motion to dismiss said bill by the defendants, the Court granted the motion to dismiss said bill without prejudice, the learned Judge asserting that the bill showed a cause of complaint, but was incomplete in the allegations. Immediately thereafter, a new Bill in Equity, No. 197, was filed and, on the hearing of appellants' motion to dismiss this Bill, and the order to show cause why a temporary injunction should not issue, an order was made granting an injunction *pendente lite,* and, it is from this order that appellants now appeal.

It is called to the attention of this Court that, though the order of the Superior Court allowing Guardian *ad litem* compensation, etc. (Record, p. 93), directs said guardian to pay the sum of $1250.00 to said Krueger, by depositing the same in the German Savings and Loan Society to the credit of said August F. Krueger, and subject to his order, yet, in fact and truth, said guardian has not complied with said order, and has not paid said sum of money into said bank, but, has retained the same in his possession. It is well also to note, that the said sum of money, by way of alleged compromise, has neither been paid into Court, nor, to said Krueger.

It is also called to this Court's attention that, in the statement of items of the amount claimed due to appellants (Record, pp. 35, 36), said $1500.00, alleged compromise is charged to said Krueger, and,

also, interest thereon, though he has never had the same, nor had the usufruct thereof.

Appellants disingenuously make much of the alleged testimony of Mr. Temple, as set forth in the transcript of the testimony at the trial in the ejectment suit, to wit: that he "filed a motion of appeal from the *judgment* of foreclosure," though the reading of the testimony (Record, pp. 79 to 86) demonstrates that there could not have been any appeal from the judgment (i. e. of foreclosure) as the time within which to appeal had expired several months prior to the date when Krueger first called on Temple to ask aid to *redeem* the property. The testimony, at the December trial of the ejectment suit, given by Mr. Temple, after it had been transcribed, was not submitted to said Temple for his approval or correction, and, if it had been so submitted, the error of "appeal from the *judgment,*" instead of *appeal from the order of Judge Hebbard refusing to vacate the said judgment of foreclosure because it was void, and, permititng the filing of the answer nunc pro tunc,* would not be in the transcript. Nor, was the testimony, as set forth in the transcript of testimony at the ejectment suit, and alleged to be that of Mr. Temple, called to the attention of Mr. Temple for approval or correction, by said Otto Tum Suden, when he settled the bill of exceptions presented and filed by the attorney for Mrs. Suter, on her appeal from the judgment given in March, 1914, in favor of Krueger. Therefore, Krueger calls this to the Court's attention.

ARGUMENT.

The trial court did not err in granting the injunction upon the facts proved. The trial court listened to the argument of appellants, and considered the points and authorities presented by appellants and appellee.

The allegations of the Bill sufficiently show equity, and it is with equity, and should not be dismissed, nor, should the order granting the temporary injunction be reversed, and, the appellee should be permitted to have his suit disposed of, on fair trial and proofs.

The Bill in this case has been heard but once; the injunction, *pendente lite* was granted, on the hearing of appellee's order to show cause why said injunction should not issue and on the motion to dismiss said bill by the appellants. If the Bill is without equity yet, by amendment, is capable of being made with equity, the Bill should not be dismissed or disallowed, but the Bill be ordered amended; (Act of March 3, 1915, Chap. 90, Vol. 38 (Part 1), U. S. Public Laws, p. 956). The appellants, at the time said injunction was granted, had not filed answers to the Bill nor was a full hearing had on the pleadings and proofs. The case of *Smith* v. *Vulcan etc.,* 165 U. S., 518, cited by appellants, is a case where an interlocutory injunction was granted after answer and replication filed and a full hearing on the pleadings and proofs had,—in short the case tried,—and it is there held by this that, if, after such condition, the Bill is without equity, it shall be dismissed. To the

same effect are the other cases cited by appellants on the point, that the Circuit Court of Appeals, on an appeal from an interlocutory order, *may,* if it is of the opinion that the Bill is without equity, order its dismissal.

Mast v. *Stover etc.,* 177 U. S., 495, is authority for the proposition that, "if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment," the bill should be dismissed. Appellee contends that this bill, on its face, shows that he is entitled to equity and that the bill is with equity and if the bill is without equity, yet it is not incapable of being cured by amendment of the bill.

Mast v. *Stover,* page 494, holds further that the power of the Circuit Court of Appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction, is not concluded by the case of *Smith* v. *Vulcan etc.,* 165 U. S., 518, cited by appellants.

All the decisions upon this proposition point out that, if plaintiff's bill be defective, yet capable of correction by amendment, such amendment will be allowed and the case tried on its merits and the order granting the injunction be permitted to remain in force until the case is disposed of.

It is submitted that, if this Court be of the opinion that appellee's bill is without equity, but capable of

being corrected by amendment, the bill should not be dismissed, but allowed to be amended and the plaintiff to maintain his suit (Act of March 3, 1915, Chap. 90, Part I, Vol. 38, U. S. Public Laws, p. 956).

We confidently and respectfully submit to this Hon. Court this argument, namely: That the interlocutory restraining order and injunction be upheld and the bill itself sustained, as this Court by means thereof are preventing the Suter interests from using the two State court unconscionable judgments (foreclosure decree and ejectment), to extort money and property from appellee, who ought not in equity and good conscience to suffer it—and that a grievous wrong will be perpetrated on appellee if the Court of Equity does not act to protect appellee.

National Surety Co. v. *State Bank,* 120 Fed., 597;
Marshall v. *Holmes,* 141 U. S., 589-596.

I. The parties to this suit are of diverse citizenship, the appellee being an alien citizen of the Republic of Switzerland, while the appellants are citizens of the United States of America, residing in the State of California. This is not the case of citizens of different States, but of an alien citizen with citizens of a State in the United States of America. The bill alleges the citizenship of appellee and his mother; it also alleges that defendant Eggers is the Sheriff of the City and County of San Francisco, State of Cali-

fornia, but does not in so many words allege that said Eggers is a citizen of the United States of America. Yet, said Eggers, to be the Sheriff of the City and County of San Francisco, must be a citizen of the United States of America; as to the other defendant appellants, it is admitted that no allegation of citizenship is made; tho, from the bill, it can be argued that all of said appellants are citizens of the United States of America. But appellee well knows that the courts will not permit citizenship of either party to an action to be argued into the bill, so appellee, as it is possible to do so, asks that this Court permit said bill to be amended on the record pursuant to said Act of March 3, 1915, with an allegation of the citizenship of the appellants.

Amendment to show jurisdiction granted, see *Great So. Fireproof Ho. Co.* v. *Jones,* 177 U. S., 458.

II. The bill is with equity, because it shows that plaintiff had no certain, complete, prompt, efficient and adequate remedy at law. The bill shows that, Krueger's right to claim error in and to appeal from the judgment entered against him by consent of his guardian *ad litem* had been waived and lost to him. The bill further shows that he caused a motion to be filed in the court (rendering the judgment against him) asking that the said judgment be set aside; also, that all the orders signed and filed by the said guardian *ad litem* be set aside. This motion was denied. A writ of possession was in the hands of the Sheriff

and he was proceeding to execute the same on Krueger, which would have meant Krueger's being ousted from possession of his deceased mother's property, and the placing of the appellants in possession thereof. The necessities of the case, as by the bill set forth, demanded immediate, prompt, certain, complete and efficient remedy to be applied for and resorted to. To have appealed from the order refusing to set aside the judgment and the orders of compromise and waiver and release of appeal, would have taken too long, and not given Krueger that speedy, certain, complete, prompt and efficient remedy, to attain ends of justice, as would a remedy by the suit in equity. Further, the bill shows that Krueger made his application by motion, within a reasonable time, to-wit, a month, whereas, the Section 473 of the Code of Civil Procedure of California permits such motion to be made within six months.

The bill shows that Krueger had no adequate remedy at law; for, a remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. *Bank of Kentucky* v. *Stone,* 88 Fed.

To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is "as practical and efficient to the ends "of justice and its prompt administration as the "remedy in equity:"

Boyce v. *Grundy,* 3 Pet., 210-215;
Sullivan v. *R. R. Co.,* 94 U. S., 806-811.

And application of the rule depends upon the circumstances of each case:

Watson v. *Sutherland,* 5 Wall., 74-79.

In *Williams* v. *Neely,* 134 Fed., 1-10, "adequate "remedy at law which will deprive a court of equity "of jurisdiction is a remedy as certain, complete, "prompt and efficient to attain ends of justice as "remedy in equity."

Other decisions supporting this rule:

Thompson v. *Allen County,* 115 U. S., 550;
Peck v. *Ayers,* 116 Fed., 273, 274, 275, 276;
McMullen Lumber Co. v. *Strother,* 136 Fed., 295;
19 *Cent. Dig. "Equity,"* Section 152;
Farwell v. *Colonial Trust Co.,* 147 Fed., 480.

Plaintiff has no adequate remedy at law and his only relief is by equity. The complaint shows that plaintiff would be ousted from his possession of the said property, by reason of the Writ of Possession issued on the judgment, in the ejectment suit, obtained by fraud, conspiracy and collusion; and that such action, if permitted will result in the loss of the property of the estate of Anna Maria Krueger, deceased, to which plaintiff is the heir; thereby depriving appellee of his inheritance and property, and which property is still subject to the jurisdiction of the Probate Court; there having been no Decree of

Distribution; and no provision made for payment of deceased's debts, funeral and testamentary expenses, nor for the costs of administration fees and commissions by law allowed, which are a first charge and lien on the deceased property by the laws of California.

It is here submitted that the appellee, after having made his motion to vacate the ejectment-judgment rendered against him, BY CONSENT, and to vacate all the orders and waivers of errors and of appeal, (and such motion being made in less than thirty days after the entry of said judgment, and denied) has exhausted his law remedy, as well as having been deprived of his legal remedy, and that his only course, to obtain justice, is, by equity proceedings. It is further submitted that the appellee has in no way shown laches or delay; but on the contrary, has shown such activity in his effort to set aside the said fraudulent, collusive and "consent" judgment in ejectment, as is not usually found in a litigant of unquestioned mentality, let alone a man who is claimed (and this claim is only made by the parties against him), to be mentally wrong.

III. THE BILL IS WITH EQUITY, SHOWING THE JUDGMENT IN THE STATE COURT OBTAINED BY FRAUD.

The bill clearly shows that fraud, collusion and conspiracy to defraud were rampant in the procuring of the judgment in favor of Mrs. Suter, in the ejectment suit, on July 11, 1914. On March 4th, 1914,

in this same suit, after trial had, and the matter held under submission by the Court from December 13, 1913, to March 4, 1914, a judgment was given in favor of Krueger, and denying any interest in the Estate of Daniel Suter in the property of the Estate of Anna Maria Krueger. Otto Tum Suden, lawyer, had been appointed as the guardian *ad litem* of August Ferdinand Krueger as an *individual,* and *not* as the administrator of the estate of Anna Maria Krueger, deceased. The appointment of Krueger as administrator, was, as much a judicial determination that Krueger was not *non compos mentis,* as is the Court's appointment of Tum Suden as guardian *ad litem,* so claimed to be a determination of the condition of Krueger's mind. *Otto Tum Suden was the nominee of Mrs. Suter, and he was suggested to the Court by the attorney for Mrs. Suter; yet, Mrs. Suter was, at this time, the party plaintiff in an ejectment suit against Krueger. Her interest was not his, nor the interest of the estate of Anna Maria Krueger. The appointment was not made by the Court, on its own motion and suggestion,* but moved by interests wholly hostile to Krueger. It was not from a desire to aid Krueger with competent legal help, in the ejectment suit, that a guardian *ad litem* was requested to be appointed; BUT from a desire to have the expected judgment in ejectment absolutely unassailable. And, further, it being suggested to the Court for the necessity of a guardian *ad litem,* it was for the Court

to select such a person of its own choosing after due medical examination by expert alienists and, not a person suggested by the opposing side, for no reason than for its own advantage, without any expert testimony whatever by skilled alienists. The judgment in favor of Krueger, on March 4, 1914, was entirely unexpected by Mrs. Suter, her attorney, and Tum Suden, the guardian.

The bill shows that it was the fraud, collusion and conspiracy of Mrs. Suter and said Tum Suden, the guardian *ad litem,* that brought about the granting of a new trial to Mrs. Suter; and without a new trial, or new testimony, or the calling of witnesses for further testimony, or to explain testimony given, and by the consent of the guardian *ad litem,* the judgment of July 11, 1914, was rendered in favor of Mrs. Suter, and against Krueger. Thereafter, Tum Suden presented to the Court a petition for compromise of Krueger's claim; and on the representations made to the Court that such was for the best interests of Krueger and the estate of his mother, the Court trusting in and relying upon said Tum Suden and his statements; and the Court not being fully advised of the true facts, an order of compromise was given, whereby the guardian is authorized to compromise and to pay the money into a bank, in Krueger's name, "subject to his order" (Record, p. 93) (but the money has not even yet been paid by Tum Suden to said bank); yet Krueger is *non compos*

mentis, and unable to care for his property, as is claimed by said Tum Suden and the attorney for Mrs. Suter.

In short, the bill sets forth sufficient facts to constitute a valid cause of action, in this: two fraudulent judgments are shown; one, the judgment obtained on the foreclosure of the mortgage, and the second in the ejectment suit. Further, it is shown that the judgment in ejectment was by fraud obtained and is sought to be enforced against Krueger and the Estate of Anna Maria Krueger, to the detriment and loss of said Krueger and said estate; that Krueger has a good and meritorious defence to the ejectment suit and the judgment obtained therein on the merits; that the fraud alleged prevented Krueger from the benefit of his defense; that said judgment was obtained against Krueger from no fault or negligence of his, but, from the fraud, collusion and consent of his guardian *ad litem,* and, that said Krueger has no adequate remedy at law.

The guardian *ad litem* was without authority to make the compromise or to waive errors or rights of appeal, as was in this case done.

Guardian has no power to settle claims:

Isaacs v. *Boyd,* 5 Port. (Ala.), 388;
Johnson v. *McCann,* 63 Ill. App., 110;
Edsall v. *Vandemark,* 39 Barb., 589.

Especially so when action has gone to judgment:

O'Donnell v. *Broad,* 2 Pa. Dist. Rep., 84;
Fletcher v. *Parker,* 53 W. Va., 422.

Guardian must make vigorous defense:

Sconce v. *Whitney,* 12 Ill., 150;
Rhoads v. *Rhoads,* 43 Ill., 239;
Tyson v. *Tyson,* 94 Wis., 225.

Authority of Guardian limited:

Waterman v. *Lawrence,* 19 Cal., 218.

When action is dismissed, authority of the guardian *ad litem* to act for ward terminates:

Rosso v. *Sec. Ave. R. R. Co.,* 13 N. Y. App., 375.

Guardian can do nothing to injury of ward. His duty ends when suit ends:

Story Equity Pleading, Section 70;
2 *Story Equity,* Section 1352;
Hinton v. *Bland,* 81 Va., 592-3;
Cates v. *Picketts,* 97 N. C., 26;
Price v. *Crone,* 44 Miss., 571;
Davis v. *Gist,* Dud. Equity (S. C.), 1.

Everything must be proven. No admissions to bind ward, by a guardian, affecting his substantial rights:

Hooper v. *Hardie,* 80 Ala., 114;
Pillow v. *Sentelle,* 39 Ark., 61;
Evans v. *Davis,* 39 Ark., 235;
Cochran v. *McDowell,* 15 Ill., 10.

and this is so in law and in equity:

Atchinson Co. v. *Elder,* 50 Ill. App., 276;
Collins v. *Trotter,* 81 Mo., 275.

As it is charged in the bill that the judgment in ejectment was obtained by fraud, Krueger, as the ward of Tum Suden, the guardian *ad litem,* can dispute the said judgment for the fraud and collusion in the making of the judgment, by consent and fraud of the guardian.

1 *Daniels Ch. Pl. & Pr.* (6th Am. Ed.), 163;
Kirby v. *Kirby,* 142 Ind., 419.

The judgment of July 11, 1914, was a CONSENT judgment, consented to, as a fraud on Krueger, by his guardian *ad litem,* and, such is without authority of the guardian. No judgment by consent can be given against a ward:

1 *Daniels Negotiable Instruments,* 225 Marginal note 220;
Waterman v. *Lawrence,* 19 Cal., 210;

Fischer v. *Fischer,* 54 Ill., 231;
Tucker v. *Bean,* 65 Mo., 352;
Turner v. *Jenkins,* 79 Ill., 228.

A ward is not bound by any waiver of rights by guardian *ad litem:*

Cartwright v. *Wise,* 14 Ill., 417;
Lichfield v. *Burrell,* 5 How. Pr. (N. Y.), 341.

A ward cannot be bound by admissions of his guardian. In this respect, appellee refers to the admissions against the interest of appellee made by his guardian and evidenced at the trial of the ejectment suit, and, in the petition for compromise and the affidavit of Tum Suden, his said guardian (Record, pp. 90, 91, and 95 to 104 inclusive, and, the transcript of the testimony at the trial of the ejectment suit in December, 1914, on file in the District Court).

Bank of N. S. v. *Ritchie,* 8 Pet. (U. S.), 128;
Turner v. *Jenkins,* 79 Ill., 228;
Ingersoll v. *Ingersoll,* 42 Miss., 155;
Johnson v. *McCave,* 42 Miss., 255;
Mattson v. *Dowling,* 54 Ala., 202;
Evans v. *Davis,* 39 Ark., 235;
1 *Daniels Ch. Pl. & Pr.* (6th Am. Ed.), 169;
Ralston v. *Lehee,* 74 Am. Dec., 291.

Appellants cite Section 372 of the Code of Civil Procedure of California as the authority for Tum Suden in the compromise proceedings; but it is here

claimed and always has been claimed that, if the Court had been fully advised and informed of the true facts, and that the record was incorrect as to the testimony of Temple, and that said Temple did not testify that he, for Krueger, had appealed from the *judgment* of foreclosure, but that he had appealed *from the order, made after judgment,* to *vacate the said void judgment;* and if said Tum Suden had recalled said Temple, and submitted the testimony alaleged to have been given at said trial, the said judge would not have granted said order of compromise; nor would he have granted a motion for a new trial; nor have entered the judgment of July 11, 1914. Hence, as the Court relied upon the statements of said Tum Suden and said attorney for Mrs. Suter, and not being fully or correctly advised, the real facts being suppressed in the face of what seemed error and the law, the judge could not do else than has been done.

In short, if there had been no fraud perpetrated on Krueger by his guardian *ad litem* conspiring with Mrs. Suter, there would have been no judgment in the ejectment suit in favor of Mrs. Suter, and Krueger would not now be appealing to this Court in equity.

Appellants contend, and have cited authorities to support such contention, that as Krueger is the heir of the Estate of his mother, Anna Maria Krueger deceased, and is entitled to possession of the property,

and, has appeared in the ejectment action, that he is bound thereby and that the judgment as rendered in ejectment is good. BUT, on inspection of these authorities, it is clear that said authorities proceed on the acknowledged fact that the judgments or papers therein set forth were valid; while in this case, plaintiff (appellee) contends that the judgment in foreclosure, under which Mrs. Suter, and the estate of her husband claim title to said property and the right of possession, *was set aside as a void judgment for want of jurisdiction in the Court to make the same;* and that any rights obtained under such judgment fell when the same was set aside. Also that the last judgment in ejectment was obtained by fraud, collusion and conspiracy, and is not binding on said Krueger. Further, the said Daniel Suter, deceased, a lawyer, was not an innocent purchaser at the foreclosure sale; nor did he receive a commissioner's deed without knowledge of the fact that the judgment was void; and Mrs. Suter, his wife and executrix, is charged with the same knowledge.

The ejectment action should have been brought against Krueger, as the administrator of the estate of Anna Maria Krueger, deceased, in whom the title of the property is. The possession of Krueger is that of and by virtue of being administrator. His possession as said administrator is lawful, and not obtained by either malfeasance, misfeasance or by tort. He is there under a legal right, representing an interest claiming the title absolute to the property.

IV. THE BILL SHOWS A MERITORIOUS DEFENSE TO THE ACTION IN THE STATE COURT.

The bill shows that Krueger, not as an individual but as the administrator of the Estate of Anna Maria Krueger, deceased, appeals to this Court, in equity, for relief from a judgment obtained in the State Court by fraud. It further shows that Krueger is the son and heir of the said deceased person, and, that he is entitled to inherit the property; that the estate has not been closed, nor distribution made, nor the debts, fees and expenses of administration paid. The bill further shows that the judgment obtained by foreclosure proceedings was void and set aside; and that it is by and by reason of title derived from this void and set aside judgment that Mrs. Suter and the estate of her husband claim the title to and right of possession of the said property. The record of the trial of the ejectment suit shows this as fact; and that said estate of Suter seeks to derain title to said property by reason of a certain deed, issued by a commissioner, under the said foreclosure judgment set aside as void for want of jurisdiction.

A judgment of the State Court foreclosing a mortgage, void for want of jurisdiction, and for that reason set aside, gives no protection to any one acting under it or by reason of it.

Wagner v. *Drake*, 31 Fed., 854.

V. THE ORDER GRANTING INJUNCTION IS NOT ERRONEOUS, and does not stay proceedings in a State Court.

The order is not in violation of Section 265, Judicial Code (36 Stat. L., 1162), re-enacting Section 720, Revised Statutes.

Iron Mountain Ry. Co. v. *City of Memphis,* 96 Fed., 131;
French v. *Hay,* 22 Wall., 250-3;
Dietsch v. *Huidekoper,* 103 U. S., 494-8;
Fisk v. *R. R. Co.,* 9 Fed. Cases, 167;
Sharon v. *Terry,* 36 Fed., 337;
Union, etc. v. *Univ. Chicago,* 6 Fed., 443;
Garner v. *Bank,* 67 Fed., 443;
High on Injunctions, "Irreparable Injury," Preliminary Injunctions, S. S. 7-10;
W. U. T. Co. v. *Louisville,* 201 Fed., 919;
Equitable T. Co. v. *Pollitz,* 207 Fed., 74;
Union R. R. Co. v. *Ill. Cent. Co.,* 207 Fed., 745;
Mo. etc. Co. v. *Chappell,* 206 Fed., 688.

In *National Surety Co.* v. *State Bank,* 120 Fed., 597, citing *Marshall* v. *Holmes,* 141 U. S., 589-596, Justice Sanborn held: "That it is no violation of "Section 720, Statutes aforesaid, for Federal courts "to enjoin the plaintiff in an unconscionable judg- "ment of a State Court from using it to extort money "from a defendant, who ought not, in equity and

"good conscience to pay it; *because such an in-*
"*junction acts on the person of the judgment plain-*
"*tiff and not upon the State Courts or its officers.*"
The foundation of equity jurisdiction is the wrong that will be perpetrated if the court of equity does not act.

Other decisions supporting claim that appellee is not seeking injunction in violation of Section 265, Judicial Code, are:

Teft v. *Sternberg,* 40 Fed., 3;
Corel v. *Heyman,* 114 U. S., 176;
Buck v. *Colbrath,* 3 Wall., 341;
Wagner v. *Drake,* 31 Fed., 851;
Kern v. *Huidekoper,* 103 U. S., 485.

Notwithstanding, *Hall* v. *Ames,* 182 Fed., 1008, it has been held that the doctrine there laid down does not prevent the filing of a bill in the Federal Court to set aside (and how much therefore to stay!) proceedings under a judgment or decree of a State Court:

Gaines v. *Fuentes,* 92 U. S., 10;
Barrow v. *Hunton,* 99 U. S., 80-83;
Arrowsmith v. *Gleason,* 129 U. S., 86;
Marshall v. *Holmes,* 141 U. S., 889;
Robb v. *Vos,* 155 U. S., 13;
Sahlgard v. *Kennedy,* 2 Fed., 295;
Simon v. *So. R. R. Co.* (C. C. A.), 195 Fed., 56;
In re Towar v. *Minnesota, etc.,* 10 Fed., 401.

The doctrine does not apply to case where the Federal Court exercises superior jurisdiction for the purpose of enforcing supremacy of the constitution and the laws of the United States.

Teft v. *Sternberg,* 40 Fed., 2-6;
Covell v. *Heyman,* 111 U. S., 176.

Though Eggers, qua Sheriff, be restrained, that does not void the injunction. The real party restrained is Mrs. Suter, her agents, servants, and employees, and Eggers (nominally Sheriff, though Sheriff no longer) has no interest in the action and Mrs. Suter's counsel voluntarily acts for him; and Eggers has not even appeared nor filed any affidavit or motion or pleading herein; and the injunction operates against him, not as a State officer, but as a servant and employee of Mrs. Suter, in her attempt to oust Krueger and obtain the said real property. Eggers, personally, can be dropped and the injunction will remain good as a restraining order preventing Mrs. Suter harassing Krueger until the Court has tried the action on its merits.

Neither deceased's Estate nor Krueger has ever had their day in Court: Suter was not entitled to the amount he claimed as 2nd mortgagee; as could and would have been shown, if there had been a genuine trial, with sworn testimony, before Judge Hebbard—and tho' Suter's money claim was then barred, Krueger did not and does not desire to press that bar, save as

a lever to prevent and diminish the extortion that Suter had practiced on deceased, which his widow seeks to perpetuate.

VI. IT IS NOT NECESSARY THAT BOND BE GIVEN, ON GRANTING INJUNCTION, AND ORDER GRANTING INJUNCTION WITHOUT BOND IS GOOD.

At the time the interim injunction was granted to appellee, a bond of $1000.00 was given, wherein it is provided that the surety in said bond would pay to the parties wrongfully enjoined or restrained, by reason of the injunction "if the said Court finally decide that plaintiff was not entitled thereto" (Record, p. 23). At the time of the making of the order granting the injunction *"pendente lite"* (which order is now appealed from), the Judge making such order prepared the same and caused the same to be filed.

Section 18, Act of Congress of October 15, 1914 (38 U. S. Statutes at Large, 738), does not apply to injunctions issued in cases of this kind, as is now before the Court. This section of said act of Congress, read with the sections that precede the same, refers to and has to do with anti-trust actions alone.

But, it is submitted, that the appellants are well and fully protected by said bond of $1000.00 from any damage that they may sustain by the order granting said injunction.

Further, this Court can order, if it so deems necessary to the interests of appellants, a new bond or an amended bond to support said injunction.

VII. Section 19 of the Act of Congress of October 15, 1914, also, does not apply to injunctions issued in cases of this nature as is now before the Court. Said section refers to anti-trust actions only.

VIII. Appellee has hereinbefore set forth the facts which he alleges to be fraud in obtaining the judgment in ejectment in the State Court, and he will not here dwell long upon the same matter. Appellee will only refer to the allegations of his complaint, filed in this suit (Record, pp, 9, 10, 11, 12, 14, 15, 16 and 17).

When a bill discloses a state of facts from which the Court can see that conclusions stated by pleader, to the effect that the judgment was procured by fraud, are properly and fairly drawn, the bill should stand:

Travelers, etc. v. *Gilbert,* 111 Fed., 271;
U. S. v. *Norsch,* 42 Fed., 417;
Passaic, etc. v. *Ely, etc.,* 105 Fed., 163.

1. *As to the competency of appellee.* The appellee is of sound mind, fully able to attend to his property and his affairs. Because he asks for what is justly his and because he is a German Swiss, of eccentric ideas and habits, never, by reason of his being an alien, associating with his neighbors, but keeping to himself, those people who have opposed him and wish to obtain the property, easily call him crazy. Krue-

ger's trouble has been, and is now actually so, a great lack of money with which to fight his legal battles and support himself. He is now over sixty-five years of age, and seeks to make a precarious living at his now dead trade of a wood engraver. His manner of answering a question or explaining a fact or transaction is peculiar, but in no way shows the ear-marks of a man out of his mind. When he appeared before the Court, he protested against the claim of Mrs. Suter; and on the claim of Mrs. Suter's attorney, without medical testimony, or outside testimony as to Krueger's fitness and condition of mind, and because Krueger seemed to be a pest, the Court appointed Tom Suden, at Mrs. Suter's attorney's suggestion and request, as the guardian *ad litem*. Thereafter, at the trial of the ejectment suit, said Tum Suden refused to permit Krueger to testify, stating to the Court that Krueger was *"non compos mentis"* and did not know what he was talking about,—yet, when Krueger came to present counsel and stated the facts of his case, said counsel have had no difficulty in ascertaining the truth of those facts. Further, Krueger has always been found prompt in engagements and has a good memory.

In court, with his guardian *ad litem* precluding him from a fair trial, and against him as an incompetent, it is little wonder that the man became excited and beside himself. Krueger did not have anything to say about the compromise of his judgment, and

the giving away of his property by his guardian *ad litem,* and he knew nothing of the same, until informed by his guardian that he, Tum Suden, had $1500.00, out of which he, Tum Suden, was to keep $250.00. Immediately Krueger refused this and rejected it and sought another attorney to set aside the judgment and the compromise. Does this appear as if the man was incompetent? Meanwhile Tum Suden enjoys possession of the entire sum of $1500.00. He has disobeyed the Superior Court's order that he pay $1250.00 to Krueger's credit, with the German Savings & Loan Society.

2. *As to the alleged fraud of appellants.* Appellee has already presented the same hereinbefore; but he will call the Court's attention to this fact:—that the ejectment action of Mrs. Suter and her claim of title to said property is based solely upon a deed, issued by a Commissioner on a judgment of foreclosure of a mortgage on said property, to Daniel Suter, which said judgment was, by the Court, set aside as *void* for want of jurisdiction. Appellant, Mrs. Suter, has proceeded on the theory that her commissioner's deed was based upon a *valid* judgment; whereas, in fact and truth, such judgment was set aside and is non-existent.

At the trial of the ejectment suit, Warner Temple testified as to the facts of the setting aside of this judgment; and, further, he testified as to all the facts surrounding the setting aside of the judgment, to wit,

that he made a motion to vacate this judgment for want of jurisdiction which motion was denied; and from the order denying his motion to vacate the said judgment he appealed. When the testimony was transcribed, it is thereby made to say that Temple testified that he appealed from the *judgment* of foreclosure; which was not his testimony, nor was it the fact. At the first trial of the ejectment suit, the guardian *ad litem* consulted with said Temple as to his acts concerning the said judgment, and depended for his testimony for such upon said Temple, *and won the case;* yet when Tum Suden's attention was directed thereto by Mrs. Suter's attorney (as he claims), that Temple (by the transcript), testified that he had appealed from the judgment (instead of having appealed from the *order* refusing to vacate the judgment), why did not said guardian, a lawyer, consult with Temple, show him his testimony, and obtain the truth of the same? Temple was present then, and is still alive.

As no appeal was taken from the judgment of foreclosure, there is nothing in the point that an appeal was pending; therefore, the order of Judge Hebbard, made after judgment and setting aside the void judgment for lack of jurisdiction, was within his right to do so. Judge Hebbard, on being shown that he had no jurisdiction to make the foreclosure decree, had the right and power to vacate such decree at any time, *ex propria motu.*

A void judgment is determined by inspection of the judgment roll:

Dell Campo v. *Camarillo,* 154 Cal., 396.

Motion to vacate a judgment is direct and not a collateral attack:

People v. *Mullan,* 65 Cal., 396;
People v. *Pearson,* 76 Cal., 400.

A judgment void for want of jurisdiction, can be vacated on motion, irrespective of lapse of time:

People v. *Greene,* 74 Cal., 400;
Eliot v. *Bastian,* 11 Utah, 466;
People v. *Povis,* 143 Cal., 676 (Approv. *Wiencke* v. *Bibby,* 15 Cal. App., 53);
Winrod v. *Wolters,* 141 Cal., 403;
Thompson v. *Corkle,* 43 Am. St. Rep., 348;
1 *Freeman on Judgments* (4th Ed.), S. 93, p. 193-4.

The records and documents of the foreclosure action do not show any appearance by said Farnham, at the time of the trial. Mr. Clough has no clear recollection of what transpired at this trial, or who was present, and it is admitted that no answer was ever filed in the court, nor is there any proof of service of the summons in said action.

It is to be remembered that the ejectment suit was against Krueger *as an individual;* that the present bill is by Krueger, *as the administrator of the Estate of Anna Maria Krueger, deceased.*

It is well established law that the administrator is but an officer of the probate Court, for the purposes of administration of the estate; and that the control of the property of the deceased is in the probate court, subject to its orders and that the heirs of an estate have no title to the said property of the estate until the final distribution of the property thereof to the heirs.

Re Vance, 152 Cal., 760-63;
Code Civil Procedure, California, Secs. 1384-1452-1581;
Robertson v. *Burrow,* Cal., 568-574;
Maddox v. *Russell,* 109 Cal., 417.

IX. This suit, before this Court, is maintained by Krueger, as the administrator of the Estate of Anna Maria Krueger, deceased, and not as an individual. In the State Court, Krueger moved as an individual, and was sued therein as an individual. Hence, doctrine of *Res Adjudicata* does not apply.

It is respectfully submitted that the order and interlocutory decree should be affirmed, and the bill

sustained, and the appellants ordered to try the issues on the merits.

Dated: San Francisco, March 20, 1916.

WARNER TEMPLE,
Solicitor for Appellee.

M. H. FARRAR,
Of Counsel.